File
(3) May 16, 2005

No. 04-1382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

JAMES MAXWELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent respectfully submits the following as the question presented:

Whether 18 U.S.C. § 2252a(a)(5)(b), which prohibits the knowing possession of child pornography "that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce," is unconstitutional, as exceeding congress's commerce clause authority, as applied to respondent's intrastate possession of child pornography stored on computer disks that had traveled in interstate commerce before the disks contained any illegal images.

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The Respondent, James Maxwell, respectfully requests that this Court deny the United States' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit concerning the court of appeal's constitutional holding in this case. Should this Court grant the United States' petition, Mr. Maxwell has submitted a conditional cross-petition for a writ of certiorari to review the judgment of the Eleventh Circuit.

OPINION AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 386 F.3d 1042. The order of the district court is unreported.

STATEMENT

Respondent was convicted of two counts of knowingly possessing child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), following a jury trial before the U.S. District Court for the Middle District of Florida during May 2003. Count One of the indictment charged Mr. Maxwell with possession of a computer zip disk containing images of child pornography. Pet. App. 5a. Count Two charged Mr. Maxwell with possession of a computer floppy disk containing such images. Pet. App. 5a. The child pornography statute at issue proscribes the possession of images of child pornography "that has been mailed, or shipped or transported in interstate or foreign commerce," or "that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce." 18 U.S.C. § 2252A(a)(5)(B). In this case, the government solely relied on the latter jurisdictional hook. Pet. App. 3a. For this element, the government further solely relied on the stipulated fact that the disks charged had been "manufactured outside the State of Florida and have been mailed, shipped or transported in interstate commerce." Pet. App. 3a, 11a-12a. For his

convictions on Counts One and Two, Mr. Maxwell was sentenced to 66 months in prison. Pet. App. 12a & n.10.

The Eleventh Circuit, in an opinion authored by the Honorable Gerald B. Tjoflat, reversed Respondent's convictions. Pet. App. 1a-56a. The court of appeals first rejected Respondent's statutory interpretation of 18 U.S.C. § 2252A(a)(5)(B) that the child pornography was not "produced" using the computer disks. Pet. App. 15a-19a.[1] The court of appeals then reached, and ultimately agreed with, Respondent's constitutional argument that the application of this statute to Respondent's intrastate possession of child pornography exceeded Congress's authority, since the only connection to interstate commerce the government proved was that the charged disks had traveled in interstate commerce before the images were stored on them. Pet. App. 12a, 19a-56a.

1. The government's evidence showed that the two charged computer disks containing images of child pornography were found among Respondent's possessions in a packed room in a house in St. Petersburg, Florida. Pet. App. 4a-6a; Maxwell C.A. Br. 4. The government never proved that Respondent produced the images or that he had even viewed the images. Pet. App. 51a-52a. Additionally, the government never showed that Respondent purchased the images, traded the images, downloaded them from the Internet, or otherwise obtained them through the phone lines or any other channel of interstate commerce. Pet. App. 51a-52a.[2] Moreover, the only proof that the

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[1] The Eleventh Circuit also rejected Mr. Maxwell's evidentiary arguments, Pet. App. 12a-13a, and his argument that the government had failed to provide sufficient evidence that he "knowingly" possessed child pornography, Pet. App. 13a-15a. Respondent has raised the statutory interpretation issue in his cross-petition for a writ of certiorari.

[2] While, as Petitioner notes (Pet. 4 n.1), agents found nine images of child pornography on the computer of Alberta Wallace, the government could not show who viewed them, and Defendant was not charged with possession of these images. Maxwell C.A. Br. 7-8.

government offered concerning the origin of an image showed that it was taken in Florida. Pet. App. 52a. Petitioner asserts that one of the minors in one of the images was from Texas, suggesting that the pornographic image had moved interstate; the government claims that it could not prove this fact since the witness could not identify the site where the photographs were taken. Pet. 12-13. The government also did not attempt to show, however, from where the photographs were obtained. The government made a choice to show a connection to interstate commerce by only proving that the two charged disks had traveled in interstate commerce before any images of child pornography were stored on them. Pet. App. 51a-52a.

2. The district court rejected Respondent's arguments that the government had not provided sufficient evidence that the images had been "produced" using the computer disks, and that "produced" did not include, as a matter of statutory interpretation, storing or saving images onto disks. The district court also rejected Respondent's arguments, timely raised in the district court (Pet. App. 20a & n.13), that the application of 18 U.S.C. § 2252A(a)(5)(B) exceeded Congress's powers under the Commerce Clause.

3. The Eleventh Circuit reversed based on Respondent's Commerce Clause argument. The Eleventh Circuit first considered the limits of congressional power, recognizing that Congress may only legislate within its enumerated powers and that "[t]he regulation of criminal activity in particular has long been regarded as a role reserved primarily to the states." Pet. App. 21a. The court then discussed the three categories of activity that Congress may reach under its Commerce Clause power, and noted that the government did not rely on Congress's authority over the channels of interstate commerce or the instrumentalities, persons, or things in interstate commerce. Pet. App. 23a-25a. Instead, the Eleventh Circuit considered whether Congress could reach Respondent's

intrastate possession on the grounds that it "substantially affect[s] interstate commerce." Pet. App. 25a (internal quotation marks omitted).

In considering the government's prosecution of this case, the court of appeals emphasized that the government solely relied on its proof that the disks had traveled in interstate commerce before the images were saved on them. Pet. App. 22a, 25a. As the Eleventh Circuit stated, "[The] pornography was saved on computer disks that had traveled from out-of-state before they contained illegal images. The Government proved nothing more. Apart from the origin of the disks (before they had been committed to nefarious purposes), Maxwell's case involved no apparent connection to activity beyond Florida." Pet. App. 22a.

The Eleventh Circuit then applied the four factors outlined in this Court's opinion in *United States v. Morrison*, 529 U.S. 598 (2000). Pet. App. 21a, 26a-56a. Considering the first factor, the court of appeals found nothing commercial or economic about the Respondent's possession, since the "act of possession alone – the only act for which Maxwell was charged – entails no transactions, no consumption of goods or services, and no necessary resort to the marketplace." Pet. App. 27a. Instead, the court found that Congress's resort to the relationship between the materials that were used to produce the image (such as cameras, film, and disks) and interstate commerce "smack[ed] of pretext," since Congress's "true and core purpose is to criminalize the possession of child pornography." Pet. App. 29a-30a. Distinguishing the activity at issue in *Wickard v. Filburn*, 317 U.S. 111 (1942) – where this Court "relied heavily on the statute's economic purpose and Congress's long-recognized authority to enact price regulations that affect the national market," Pet. App. 28a – the Eleventh Circuit concluded that the "regulated intrastate activity in this case is more similar by far to the brand of intrastate criminal conduct that is a proper subject for state regulation

alone than it is to the sort of economic activity addressed in *Wickard*." Pet. App. 30a. The Eleventh Circuit echoed this Court's holding in *Morrison* in stating that "the noneconomic, criminal nature of Maxwell's conduct is central to our decision." Pet. App. 30a.

The Eleventh Circuit next considered the fourth *Morrison* factor and found that if Respondent's "conduct has had any effect on interstate commerce, that effect is attenuated to say the least." Pet. App. 31a. The court specifically noted that in this case the only connection between Respondent's conduct and interstate commerce was possessing "two disks that traveled from out-of-state." Pet. App. 32a. The government had not shown any evidence that Respondent was a potential child molester, that his conduct would increase the supply and distribution of child pornography, or that his possession would encourage others to possess such images. Pet. 32a-33a. Because Respondent's activity was noneconomic and noncommercial, the court of appeals, citing *Morrison* and *Lopez*, found that aggregation of effects was not appropriate. Pet. 33a-35a. The court made it explicit that it had "no intention of breaking new ground here," and heeded this Court's warning that "applying an aggregation approach to noneconomic, criminal activity when assessing its impact on interstate commerce would effect an interpretation of the Commerce Clause that essentially vests general police powers with the federal government." Pet. App. 35a.

Considering the second *Morrison* factor, the Eleventh Circuit found that the jurisdictional hook in 18 U.S.C. § 2252A(a)(5)(B) failed to ensure that the statute would be applied only to cases within Congress's Commerce Clause authority. Pet. App. 38a-42a. The Eleventh Circuit, like other circuits, found that this jurisdictional hook provided no meaningful limit to federal jurisdiction, since it was difficult to conceive of images that would be produced with technology that had not traveled in interstate commerce. Pet. App. 40a-41a. The court therefore concluded that the "jurisdictional

book is patently insufficient to ensure the statute's constitutional application in a case such as Maxwell's." Pet. App. 42a.

The Eleventh Circuit lastly considered the third *Morrison* factor and concluded that the legislative history contained little in the way of findings on the effect of child pornography on interstate commerce, and instead reflected findings that child pornography is "is bad and harmful to children." Pet. App. 46a. The court ultimately found that there was nothing in the legislative history "to persuade [the court] that possessing child pornography produced with materials transported in interstate commerce is an activity that has a substantial effect on interstate commerce." Pet. App. 50a.

REASONS FOR DENYING THE WRIT

The judgment of the Eleventh Circuit does not warrant this Court's review. The judgment rests on a highly fact-specific application of this Court's settled precedents concerning Congress' power under the Commerce Clause, U.S. Const. Art. I, § 8, cl.3. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). In this case, the government made the decision to rest its constitutional argument on the incredibly broad theory that Congress has constitutional power to criminalize any action taken using a computer disk that previously traveled in interstate commerce. The court of appeals properly rejected that theory, and nothing in *Ashcroft v. Raich, cert. granted*, 124 S. Ct. 2909 (2004) (No. 03-1454) is likely to change that.

1. The Eleventh Circuit's decision is not erroneous and does not "seriously undermine[] Congress's comprehensive scheme to eliminate the interstate market in child pornography." Pet. 8. Instead, the court of appeals' decision merely applies this Court's holdings in *Lopez* and *Morrison* to determine that, based on the facts of the instant case, the application of the statute exceeded

Congress's authority under the Commerce Clause. Pet. App. 21a, 51a-52a. The only connection to interstate commerce that the government alleged, and chose to prove, was that the disks on which the child pornography was saved had traveled, when blank, in interstate commerce. Pet. App. 22a, 25a, 31a-32a, 51a-52a. The government's failure to prove the connection between Respondent's conduct and interstate commerce was determinative to the Eleventh Circuit's holding. Pet. App. 51a-52a. This decision is therefore limited to its facts and does not represent a serious challenge to Congress's comprehensive regulatory scheme concerning an interstate market of child pornography.

a. Congress's powers are limited to those that are enumerated in the U.S. Constitution *Lopez*, 514 U.S. at 552. Petitioner asserts that within the Commerce Clause authority, Congress may "regulate an entire class of activities that substantially affects interstate commerce, even if the commercial effect of an individual instance within the class is slight." Pet. 9. Because the Respondent's possession of child pornography was only an intrastate, noneconomic and noncommercial activity, Congress's power under the Commerce Clause over this case cannot be sustained. *See Morrison*, 529 U.S. at 611 ("*Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."); *Lopez*, 514 U.S. at 559-60 (providing examples of such cases and indicating that "the pattern is clear[:] [w]here *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained") (emphasis added).

Petitioner appears to concede that the possession in this case was not commercial, and instead contends that Congress may reach even non-commercial intrastate activity "if regulation of that activity is reasonably necessary to achieve Congress's regulatory objectives with respect to an

interstate market," citing this Court's opinion in *Wickard v. Filburn*, 317 U.S. 111 (1942). Pet. 10. The distinguishing factor of the instant case is not that Respondent's contribution to or effect on an interstate market in child pornography was slight, but that it was not proven at all. Pet. App. 1a-56a. The only fact that the government proved was that Respondent possessed two computer disks containing child pornography within a single room in a house in St. Petersburg, Florida. The only origin of an image proven at trial was that it was taken in Florida. As the Eleventh Circuit found, unlike *Wickard*, Respondent's activity, the possession of images of child pornography, was not economic in nature and did not compete with the supply of child pornography in the market. Pet. App. 27a ("The act of possession alone – the only act for which Maxwell was charged – entails no transactions, no consumption of goods or services, and no necessary resort to the marketplace."). The government relied only on the fact that the disks had traveled in interstate commerce before the images were stored on them. Thus, the connection between interstate commerce and the disks had ended before the criminal activity at issue in this case.

Wickard's aggregation principle is therefore inapplicable. *See Morrison*, 529 U.S. at 611 n.4 ("[I]n every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn* . . . the regulated activity was of an apparent commercial character."); *id.* at 613 ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *Lopez*, 514 U.S. at 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."). In the instant case, the government never

demonstrated any connection between the Respondent's activity and interstate commerce, let alone a substantial connection. *See Morrison*, 529 U.S. at 610 ("But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."); *Lopez*, 514 U.S. at 557-58 (discussing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968), and stating that "[n]either here nor in Wickard has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities....Rather, '[t]he Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'") (citations and emphasis omitted).

Petitioner does not address the other three factors outlined in *Lopez* and *Morrison* in its argument. Considering the second factor, the Eleventh Circuit correctly joined other circuits in rejecting the argument, or expressing doubt, that the jurisdictional hook in 18 U.S.C. § 2252A(a)(5)(B) and similar statutes ensures that the statute reaches only those activities within Congress's Commerce Clause power. Pet. App. 38a-42a; *United States v. Rodia*, 194 F.3d 465, 472-73 (3rd Cir. 1999); *United States v. Angle*, 234 F.3d 326, 337 (7th Cir. 2000); *United States v. McCoy*, 323 F.3d 1114, 1124-27 (9th Cir. 2003); *cf. Lopez*, 514 U.S. at 562 ("[Section] 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an *explicit connection* with or effect on interstate commerce.") (emphasis added); *id.* at 567 (holding Section 922(q) unconstitutional, noting "there is no requirement that [defendant's] possession of the firearm have any *concrete* tie to interstate commerce") (emphasis added). Indeed, the only connection between interstate commerce and Respondent's activity in this case was that the disks on which the child pornography ultimately was stored had been manufactured

outside the State of Florida and had been mailed, shipped, or transported in interstate commerce. The government never proved that the Respondent purchased the images, traded the images, or obtained the images from channels of interstate commerce. The government never proved that the Respondent ever viewed the images, or that he was even the one who loaded the images onto the disks (the items that actually traveled in interstate commerce).[3] The jurisdictional hook therefore fails to ensure that the statute only reaches conduct falling within Congress's Commerce Clause powers.

The Eleventh Circuit also correctly found that the legislative history did not evidence findings regarding the effects of intrastate possession of child pornography on interstate commerce. Pet. App. 42a-50a. While noting that ultimately this determination is for the judiciary, not the legislative, branch (Pet. App. 43a (citations omitted)), the Eleventh Circuit properly concluded that the legislative history failed to show that activity such as Respondent's has a substantial effect on interstate commerce. Additionally, the legislative history of an earlier child pornography statute reveals that the United States, even before *Lopez* and *Morrison*, has taken a different position than the one asserted here. The U.S. Department of Justice's views on the pending legislation were reported as follows:

> [T]he investigation or prosecution of purely local acts of child abuse should be left to local authorities *with federal involvement confined to those instances in which the mails or facilities of interstate commerce are actually used or intended to be used for distribution of the film or photographs in question.*

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[3] Whether "produced" under 18 U.S.C. § 2252A(a)(5)(B) includes storing or reproducing on computer disks is addressed in Respondent's cross-petition. It is important to note here, however, that the government did not prove that *Respondent* stored or saved images onto disks.

Pet. App. 50a (quoting statement of Assistant Attorney General Patricia Wald) (citation omitted) (emphasis added). In the instant case, that the computer disks on which the images were stored had moved in interstate commerce is simply too attenuated to support congressional authority under the Commerce Clause over this case of intrastate possession of child pornography.

Finally, the Eleventh Circuit properly considered the fourth *Morrison* factor and found that the connection between Respondent's conduct and interstate commerce was too attenuated. Pet. App. 30a-38a. While Congress may have had a laudatory goal of eradicating the possession of child pornography, Congress does not possess general police power. *Morrison*, 529 U.S. at 617-19. Nothing prevents state authorities from regulating the very activity at issue here. *See Lopez*, 514 U.S. at 561 n.3. Respondent therefore asserts that the Eleventh Circuit appropriately considered the four factors outlined in *Morrison*, and the petition should therefore be denied.

b. Petitioner's attempt to justify congressional power under the Commerce Clause in this case by arguing that Congress can eradicate an entire market in child pornography is unavailing. Pet. 11. Petitioner cites *The Lottery Cases* (*Champion v. Ames*), 188 U.S. 321 (1903) and *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 1946 (2004). Pet. 11. In *The Lottery Cases*, however, this Court upheld congressional authority to legislate, under the Commerce Clause, the carrying of lottery tickets from one state to another. Thus, by the terms of the statute, the subject of the crime moved, and was an instrumentality, in interstate commerce. *See* 188 U.S. at 363-64. Notably, this Court, in addressing an argument raised under the Tenth Amendment, stated:

> Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any state, but has in view only commerce of that kind among the several states. . . . As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce

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which concerns all the states, may prohibit the carrying of lottery tickets from one state to another.

188 U.S. at 357.

Petitioner's reliance on *Sabri* is equally unavailing. In *Sabri*, this Court addressed Congress's power under the Spending Clause to proscribe "bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds." 124 S. Ct. at 1944. This Court rejected the defendant's reliance on *Lopez* and *Morrison*, finding that "[t]he power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place, and Sabri would be hard pressed to claim, in the words of the *Lopez* Court, that § 666(a)(2) 'has nothing to do with' the congressional spending power." *Id.* at 1947 (citing *Lopez*, 514 U.S. at 561).

Petitioner further claims that "in light of the potential difficulty of proving that a particular pornographic image has traveled across state lines," the Eleventh Circuit's holding is misconceived. Pet. 12-13. Even assuming, for the moment, that the government has some difficulty in establishing where a particular image was taken, such a difficulty does not justify a lessened standard for ensuring that the application of a federal statute is constitutional and that the federal government does not intrude on matters reserved to the states. Moreover, Respondent respectfully submits that the problem for the government in this case was that the government chose to rely solely on the fact that the computer disks had traveled in interstate commerce, when blank, believing that to be a sufficient interstate nexus. Pet. App. 52a. The government did not attempt to show any other connection to interstate commerce. Therefore, it is not clear that the government truly suffered from an inability to prove that the images had traveled in interstate commerce, but from the failure even to attempt to prove this fact.

The result of the case is thus a direct reflection of the government's choice not to provide sufficient evidence of a substantial connection between the Respondent's activity and interstate commerce. As the Eleventh Circuit stated at length:

> We believe *Morrison*'s framework produces the correct result in this case. It is difficult to imagine an activity more local in character than Maxwell's private possession of images within the confines of a single state (and perhaps, moreover, within a single home). The record shows that the Government did not allege or prove that Maxwell produced the pornography. It did not allege or prove that he purchased the pornography. It did not allege or prove that he traded or distributed the pornography or that he ever harbored any intention of doing so. It did not allege or prove that he consumed the pornography so as to affect its supply in the market. It did not allege or prove that his possession encouraged him or others to seek more pornography so as to affect its demand in the market. It did not even allege or prove that he actually viewed the pornography. As such, it strains reason to conceive of how Maxwell's activity of possession was in any sense "commerce." Moreover, the Government did not allege or prove that Maxwell's pornography traveled from out-of-state. It did not allege or prove that the pictures were originally photographed out-of-state. In fact, the only testimony concerning the origin of any charged photograph suggests that it was taken in Florida. The Government did not allege or prove that Maxwell obtained the pornography through the use of the Internet, phone lines, or any other channel of interstate commerce or communication. It did not allege or prove that Maxwell took or intended to take the pornography out of the state, for commercial or personal use. As such, it strains reason to conceive of how Maxwell's activity of possession was in any sense "interstate." *At the end of the day, the Government rested its entire case on one fact relating to the jurisdictional element: the disks on which the pornography was ultimately copied traveled, when blank, to Florida from someplace outside of Florida. We reject the Government's contention that this fact converts Maxwell's conduct into an activity subject to Commerce Clause regulation.*

Pet. App. 51a-52a (emphasis added).

2. Despite Petitioner's characterizations (Pet. 8, 13), this case is limited to a specific set of facts (Pet. App. 19a-56a), as the Tenth Circuit recently recognized. *See United States v. Riccardi*, ___ F.3d ___, 2005 WL 896430, *12 (10th Cir. Apr. 19, 2005) (citing *Maxwell* and stating that it "involved factual circumstances with much more tenuous connections to interstate commerce than the facts presented here"); *see id.* at *12 n.2 ("The holding of the [*Maxwell*] case, nonetheless, is

limited to facts in which the only nexus to interstate commerce is that the images were copied onto blank computer disks which had traveled in interstate commerce."). The government never showed that Respondent purchased, traded, downloaded, or sought to prove how he otherwise came to possess the images. The government never showed that Respondent "produced" or stored the images on the disks that had traveled in interstate commerce. The government, moreover, never proved that Respondent had ever even viewed the images. The Eleventh Circuit correctly found that this application was unconstitutional considering the four *Morrison* factors.

Finally, Petitioner requests that this Court hold this petition pending the Court's decision in *Ashcroft v. Raich, cert. granted*, 124 S. Ct. 2909 (2004) (No. 03-1454), contending that the two cases have common features. Pet. 14. *Raich* involves a civil suit for injunctive and declaratory relief based a state's attempt to exempt an entire class of persons or activity, defined as the noncommercial personal possession of marijuana for medicinal purposes, from federal prosecution under the Controlled Substances Act. *Raich v. Ashcroft*, 352 F.3d 1222, 1224-25, 1228 (9th Cir. 2003). Thus, the issue in *Raich* is whether the state may provide an exemption for an entire class of persons from federal prosecution. Of course, if an individual fails to meet the requirements of the exemption, the federal and local authorities would not be prevented from prosecuting those individuals. *See id.* at 1225-26. For those people who meet the requirements, however, the state is attempting to save those individuals from prosecution.

The issue in the instant case raises a different set of concerns. The Eleventh Circuit's decision does not exempt out an entire class of individuals or activities from federal prosecution. Instead, the Eleventh Circuit's decision was based on the fact that the government in this case failed to prove a substantial connection between Respondent's activity and interstate commerce. The court

of appeals therefore found that the prosecution of this case should have been left to the state, in accordance with federalism concerns. Pet. App. 55a-56a. In this respect, the Eleventh Circuit's opinion addressed where Respondent could be prosecuted consistent with the balance between the federal and state governments, not whether he could be prosecuted at all. Therefore, it is unlikely that this Court's decision in *Raich* would alter the outcome of this case.

CONCLUSION

For the reasons stated herein, Mr. Maxwell respectfully requests that the petition for a writ of certiorari seeking review of the Eleventh Circuit's judgment in this case be denied.

Respectfully submitted,

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